SEP 22

IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

No. 346

CHARLES PECKAT MANUFACTURING COMPANY,
Petitioner.

v.

JOHN T. JARECKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN E. HUGHES
JOHN W. HUGHES
HAROLD R. BURNSTEIN
105 West Adams Street
Chicago, Illinois
Attorneys for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA KEVIEW 5-6561

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Summary Statement of Facts	2
Specification of Error to be Urged	4
Reasons for Granting the Writ	5
Appendix	i-iii

CITATIONS.

Cases:

Cary v. Curtis, 3 Hav. 236	5
Dimick v. Schiedt, 293 U.S. 474	6
George Moore Ice Cream Co., Inc. v. Rose, 289 U.S. 378	5
Graham and Foster v. Goodcell, 282 U.S. 409	5
Superior Products Co. v. Thomas, 32 F Supp 360	6
Wickwire v. Reinecki, 275 U.S. 101	5

IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

NO.

CHARLES PECKAT MANUFACTURING COMPANY,
Petitioner,

v.

JOHN T. JARECKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Charles Peckat Manufacturing Company, hereby respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision of that court entered in the above entitled case.

Opinions Below.

The decision of the United States District Court for the Northern District of Illinois, Eastern Division (R. 132) was entered on the 28th of September, 1951. The opinion of the Court of Appeals (R. .....) is reported in 196 F. 2d 849.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 3, 1952 (R. .....). A petition for rehearing was filed on June 18, 1952 and was denied without opinion, on June 25, 1952. The jurisdiction of this Court is invoked under Section 1254(e) of Title 28, United States Code.

QUESTION PRESENTED.

Is the question of whether one is a manufacturer a question of fact? If so, where the evidence shows the plaintiff had no factory and did not make the automobile visor but instead contracted with a factory owner to make it, did the Court in taking the question from the Jury and the Court of Appeals on affirming its action in so doing invade the province of the Jury and deprive plaintiff of a right guaranteed by the Seventh Amendment to the Constitution and recognized by the United States Code and by rules 38 and 39 of Civil procedure?

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are printed in the Appendix, pages i to iii.

SUMMARY STATEMENT OF FACTS.

This statement of facts is taken bodily from the opinion of the Circuit Court of Appeals.

Taxpayer was the owner by assignment of a patent on a bracket for fastening sun visors to automobiles. It entered into a contract with Davis Stamping Company (hereinafter called Davis) of Detroit, Michigan, to fabricate sun visors including the patented bracket. It paid Davis $6.30 per visor, including the bracket. It cost 25c to 35c to manufacture the bracket. The charge of $6.30 per unit did not include any excise tax. Neither plaintiff nor its officers owned any stock or interest in Davis, nor did Davis or its officers have any stock or other interest in plaintiff.

The machinery used to fabricate the sun visors was owned by Davis and was operated by Davis employees. Under the contract plaintiff paid for and owned the dies and tools used. Plaintiff did not own or operate a factory, and did not possess any presses or other machinery required to stamp out the required metal parts. In quarters 30 feet by 30 feet in a building in Chicago it maintained an office and a small stock supply. The visors were made largely from stainless steel purchased by Davis from Rigidtex Corporation. Plaintiff did not have inspectors or other employees stationed at the Davis factory. Davis shipped the sun visors only as ordered by plaintiff or its sales agent, packing the visors in cartons. Plaintiff furnished to Davis for use on the cartons advertising and labels representing that plaintiff was the manufacturer of the visors. Plaintiff had obtained the registered trademark "Skyshield" which, with the name "Comet", was used to designate the sun visors involved in this action. This mark was incorporated in the dies used and was thus stamped on the visors.

The contract, which was in the form of a letter from Davis to plaintiff with a notation of acceptance by the latter, also contained the following provisions, among others:

"5. After the first run of 10,000 units is completed,

analysis of production costs and tool amortization shall be made for the purpose of adjusting our unit charge to you.

"6. You will make proper application to the Internal Revenue Department to determine what excise tax shall apply, if any, and at what point in the billing the tax shall be computed and assessed; you to furnish us with a copy of the Treasury Department's ruling.

* * *

"7. All orders received by us from you shall be considered firm orders and any cancellation shall be at your responsibility for all raw materials and fabricated parts and supplies purchased for such orders subject to whatever recovery we may be able to obtain from our suppliers through cancellations and return of materials and supplies."

Plaintiff sold the visors to distributors at $8.08 per unit, and, based on that figure, paid excise taxes of $45,669.28, and in its complaint plaintiff sought judgment for that amount. However, by stipulation, plaintiff has waived any right to recover the portion of the tax paid computed on its cost of $6.30 per visor, which plaintiff claimed should have been collected from Davis. The net result is that plaintiff is now seeking recovery of the difference between the tax paid based on $8.08 per visor (its selling price), and a tax based on $6.30 per visor (the amount it paid to Davis), or approximately a tax of 8c per visor.

On the foregoing facts the District Court held plaintiff as a matter of law was the manufacturer (R. 120) and took the case from the Jury (R. 120) and The Circuit Court of Appeals affirmed (R. .....).

SPECIFICATION OF ERROR TO BE URGED.

It is submitted that the District Court and the Court of Appeals erred in invading the province of the Jury and in so doing deprived plaintiff of a right guaranteed by the Seventh Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT.

The right of trial by Jury is a Constitutional guarantee of paramount importance and it is vital for this court to prevent its denial or infringement by the lower federal courts.

One does not need to be a lawyer to know that the question whether one is a manufacturer (a butcher, baker or candlestick maker) is obviously one of fact not of law. Where the evidentiary facts are undisputed it then becomes a question of ultimate fact and not a question of law. Where a Jury is impanelled the court cannot convert it into a question of law in a case like this and it is submitted it is high time for this great court to reexamine and reestablish the right to trial by Jury. Vital details bearing on this question are as follows.

An action against a Collector of Internal Revenue was given by the common law at the time the Constitution was adopted. Such rights are reserved by the Seventh Amendment and dicta to the contrary in *Wickwire* v. *Reinecke*, 275 U. S. 101, at p. 105 is erroneous. However, in that case this court reversed both Illinois courts for doing what they did here. The English Courts ruled "the king can do no wrong" but to protect the liberties of the people they held his officers strictly accountable. It was not, as Justice Cardozo unadvisedly wrote, in *George Moore Ice Cream Co., Inc.* v. *Rose*, 289 U. S. 378, at p. 382, "an anomalous relic of bygone modes of thought" (except in Communist countries where the public officers are not servants but masters of the people). It was the common law action of assumpsit. See Justice Story in *Cary* v. *Curtis*, 3 Hav. 236, at p. 255; Cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409, at p. 430.

Cases where the federal courts sitting as triers of fact found one a manufacturer or not a manufacturer are not in point and like many findings of different Juries are irreconcilable. For example, in *Superior Products Co.* v. *Thomas*, 32 F. Supp. 360, the court holds:

> "It is a tax of one's power to correlate ideas to say that one who orders a particular article made by a manufacturer in a particular way, that the one who so orders is the manufacturer and not the man who makes the article. If I go down here and order a hat made or a suit of clothes made, I do not manufacture the hat or that suit of clothes; the hatter makes the hat and the tailor makes the suit of clothes. I may take my own cloth to the tailor, but he manufactures it. There is not even the taking of the cloth here."

The tax is on a sale by a manufacturer. The Detroit manufacturer and not plaintiff bought, paid for and owned the material and we know no way under the facts title to that material could be transferred to plaintiff except by sale.

The natural tendency of men to gather into themselves power has led the lower federal courts to turn too many questions of fact into questions of law and thereby invade and whittle down an ancient Constitutional guaranty, dear to the heart of Anglo-Saxon people. Facts are for the Jury alone. See *Dimick* v. *Schiedt*, 293 U. S. 474, at pgs. 485-6.

We deem it of vital importance for this court to halt the tendency to arrogate the decision of facts to the courts. If any doubt existed it should always be resolved liberally in favor of the right to trial by Jury.

Congress is also deeply concerned that taxpayers have the right to Jury trial in suits to recover a tax. When doubts were expressed as to whether under the recent re-

organization of the Bureau of Internal Revenue taxpayers retained the right of a Jury trial in a suit against the Collector's successor, Congress forthwith enacted Public Law 567 on July 16, 1952 to clarify this point. This law made it clear that taxpayer's right to Jury trial was not impaired by the reorganization. Congress's action is meaningless if the courts are allowed to evade it by the means used in the instant case.

Wherefore, your petitioners respectfully pray that a writ of certiorari should be granted.

All of which is respectfully submitted,

JOHN E. HUGHES,
JOHN W. HUGHES,
HAROLD R. BURNSTEIN.

APPENDIX.

Statutes and Regulations Involved.

I.R.C. Sec. 3403 (c):

"(There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:)

* * * * * *

"(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 5 per centum."

I.R.C. Sec. 3443 (d):

"No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

Regulations.

Sec. 316.4:

"*Who is a manufacturer.*—The term 'manufacturer' includes a person who produces a taxable article from

scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

"Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

"A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys and assembles a taxable article from, such component parts."

Sec. 316.94::

* * * * * *

"If any person overpays the tax shown to be due on a monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax shown to be due on any subsequent monthly return. In all cases where a person overpays tax, no credit or refund shall be allowed (except as provided in the preceding paragraphs), whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written

consent of the ultimate purchaser must accompany
sworn statement filed with the credit or refund cla
For the purposes of the tax the 'ultimate purcha
is a person who purchases an article (1) for consu
tion, or (2) for use in the manufacture of other artic
and not for resale in the form in which purchased. T
statement supporting the credit or refund claim m
also show whether any previous claim for credit
refund covering the amount involved, or any p
thereof, has been filed with the collector or Comm
sioner."

Sec. 316.5:

"*When tax attaches.*—In general the tax attac
when the title to the article sold passes from the ma
facturer to a purchaser.

"When title passes is dependent upon the intenti
of the parties as gathered from the contract of sale a
the attendant circumstances. In the absence of
pressed intention, the legal rules of presumption f
lowed in the jurisdiction where the sale is made gove
in determining when title passes. Generally, t
passes upon delivery of the article to the purcha
or to a carrier for the purchaser."

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 346

CHARLES PECKAT MANUFACTURING COMPANY, PETITIONER

v.

JOHN T. JARECKI, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 136-142) is reported at 196 F. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1952. (R. 142.) A petition for rehearing filed on June 18, 1952, was denied on June 25, 1952. (R. 142-143.) The petition for a writ of

certiorari was filed on September 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the courts below erred in holding that upon the undisputed facts the taxpayer corporation was the "manufacturer" of certain automobile sun visors within the meaning of the manufacturers' excise tax provisions of the Internal Revenue Code.[1]

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

[1] The taxpayer corporation does not challenge the directed verdict (R. 119, 131, 132) that it passed the manufacturers' excise taxes on to its customers. In fact, the president of the taxpayer corporation admitted that the price at which it sold the visors included the tax. (R. 70.) Section 3443(d) of the Internal Revenue Code prohibits any refund of manufacturers' excise taxes to a taxpayer who has passed on such taxes to his customers, except to the extent that those customers have been reimbursed or have consented in writing to the refund to the taxpayer. The taxpayer corporation obtained such consent to refund from only one of its customers who had purchased only one of the visors. (R. 124.) Accordingly, since the taxpayer corporation stipulated that any recovery by it should be limited to 8 cents per visor (R. 127-128, 138), the maximum possible recovery by the taxpayer corporation in this case would be only 8 cents.

(c) [As amended by Sec. 544(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, 711] Parts or accessories (other than tires and inner tubes and other than radios) for any of the articles enumerated in subsection (a) or (b), 5 per centum. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.):

SEC. 316.4. *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys, and assembles a taxable article from, such component parts.

STATEMENT

Petitioner sued in the District Court for the Northern District of Illinois to recover manufac-

turers' excise taxes paid under protest. It was stipulated that the taxpayer had been assigned a patent covering brackets for fastening sun visors on automobiles; that under such assignment the taxpayer had entered into an agreement (attached to and made a part of the stipulation) with the Davis Stamping Company to have the latter fabricate visors including such brackets for the taxpayer; and that at all times material the taxpayer and Davis Stamping Company carried out and followed the terms of the agreement. (R. 127-128.)

The terms of this agreement between the taxpayer and Davis Stamping Company were: The taxpayer would pay for the tools. Davis Stamping Company would ship the finished products from its plant in Detroit, f.o.b. its plant, in the name of the taxpayer. Davis Stamping Company would forward to the taxpayer's office in Maywood, Illinois, on the same day as shipped, copies of all bills of lading and other pertinent information in order that prompt billings might be made by the taxpayer to its customers. After completion of a certain number of units, analysis of production costs and tool amortization would be made for the purpose of adjusting Davis Stamping Company's unit charge to the taxpayer. If the Treasury Department should rule that the taxpayer was the manufacturer for purposes of the levying of the excise tax, the taxpayer would furnish Davis Stamping Company with the necessary exemption certificate to enable it to omit the tax on its billing to the taxpayer. Orders received by Davis Stamping Com-

pany from the taxpayer would be considered firm orders and any cancellation would be at the taxpayer's responsibility for all raw materials and fabricated parts and supplies purchased for such orders, subject to whatever recovery Davis Stamping Company might be able to obtain from its suppliers. (R. 128-129.)

Prior to trial, on the basis of the foregoing facts, the Collector filed a motion for judgment (R. 5-8), and the court took this motion under advisement.

A jury was impanelled and the following testimony was given by witnesses for the taxpayer: The taxpayer and Davis Stamping Company were separately owned corporations. (R. 23.) The visors were fabricated by employees of Davis Stamping Company in the latter's plant and with the latter's stamping equipment. The taxpayer owned the dies and tools. (R. 55, 56.) The visors were made of stainless steel (R. 50) and had the taxpayer's registered trademark stamped upon them (R. 20, 21, 45). The taxpayer collaborated with Davis Stamping Company in obtaining the right to use the stainless steel. (R. 50-53.) Estimates were furnished to Davis Stamping Company as to the number of visors the taxpayer would use, based on sales projections of the taxpayer's sales representative. (R. 53.) Davis Stamping Company purchased the steel required. The Davis Stamping Company billed the taxpayer $6.30 per complete unit on the visors. (R. 35, 36.) This charge did not include any excise tax. (R. 47.) The taxpayer

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:

Bedford Mills, Inc. v. *United States*, 59 F. 2d 263, certiorari denied, 290 U.S. 655	7
Carbon Steel Co. v. *Lewellyn*, 251 U.S. 501	7
Chandler Laboratories, Inc. v. *Smith*, 88 F. Supp. 583	7
Foss-Hughes Co. v. *Lederer*, 287 Fed. 150	7
State v. *Clarke*, 64 Minn. 556	7
State v. *State Board of Assessors*, 54 N.J.L. 430, affirmed, 56 N.J.L. 717	7

Statutes:

Internal Revenue Code:	
Sec. 3403 (26 U.S.C. 1946 ed., Sec. 3403)	2, 7
Sec. 3443 (26 U.S.C. 1946 ed., Sec. 3443)	2

Miscellaneous:

Rule 50, Federal Rules of Civil Procedure	8
Treasury Regulations 46, Sec. 316.4	3, 7

set its price to distributors at $8.08 per visor. (R. 63.) This price included the excise tax. (R. 70.) In addition to the excise tax, the taxpayer paid for such items as advertising, and labels for the cartons in which the visors were shipped. (R. 59.) The taxpayer advertised that it was the manufacturer of the visors. (R. 42-43, 68.) By means of fair trade agreements in those states where such agreements are legal the taxpayer attempted to maintain the list price of the visors at $17.95 each. (R. 45, 61.) Bills of lading covering shipments of the visors were made out in the name of the taxpayer. (R. 60.) The taxpayer received the orders for visors from customers and had the right to direct whom Davis Stamping Company could ship them. Davis Stamping Company could ship the visors only at the direction of the taxpayer or the taxpayer's sales representative. (R. 60, 67.)

At the close of the taxpayer's case the Collector filed a motion for a directed verdict on the ground that there was no substantial evidence that the taxpayer was not the manufacturer of the visors or that the taxpayer had not passed on to its customers the tax which it was seeking to recover. (R. 130-131.) This motion was granted by the District Court. (R. 117-119, 132.) The Court of Appeals affirmed. (R. 136-141.)

ARGUMENT

The Court of Appeals held that on the undisputed facts the taxpayer was the manufacturer of the automobile sun visors within the meaning of

Section 3403 of the Internal Revenue Code (*supra*, pp. 2-3). It stated (R. 140):

> Admittedly either plaintiff or Davis made the initial sales as the manufacturer of the sun visors. In this suit plaintiff had the burden of proof to show that it was not the initial seller, the "manufacturer." The decision must be based on the legal conclusions to be drawn from the undisputed fact relationship between plaintiff and Davis.

Its decision that the taxpayer was the manufacturer for excise tax purposes, and that the motion for directed verdict was properly granted, is clearly correct, turns on the particular facts involved, and presents no question warranting review.

It has been frequently held that for tax purposes the term "manufacturer" may include one who has contracted with others for the actual fabrication of the product. *Carbon Steel Co.* v. *Lewellyn*, 251 U.S. 501; *Bedford Mills, Inc.* v. *United States*, 59 F. 2d 263 (C. Cls.), certiorari denied, 290 U.S. 655; *Chandler Laboratories, Inc.* v. *Smith*, 88 F. Supp. 583 (E.D. Pa.); *Foss-Hughes Co.* v. *Lederer*, 287 Fed. 150 (E.D. Pa.). See also: *State* v. *Clarke*, 64 Minn. 556; *State* v. *State Board of Assessors*, 54 N.J.L. 430, affirmed, 56 N.J.L. 717. The applicability of this principle in the instant case is confirmed by Section 316.4 of Treasury Regulations 46 (*supra*, p. 3).[2] Since the undisputed facts

[2] Section 316.4 of Treasury Regulations 46 provides in part:

> Under certain circumstances, as where a person manufactures or produces a taxable article for a person who